No. 17-765

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

VICTOR J. STITT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Tennessee's aggravated burglary statute, Tenn. Code Ann. § 39-14-403, qualifies as a generic "burglary" under the Armed Career Criminal Act, 18 U.S.C. 924(e)(2)(B)(ii).

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Respondent Victor Stitt respectfully requests this Court affirm the judgement of the U.S. Court of Appeals for the Sixth Circuit.

INTRODUCTION

Almost 30 years ago, this Court looked at the congressional record to determine what Congress meant by "burglary" in the Armed Career Criminal Act. The legislative record showed that Congress' 1984 definition of burglary, which included only buildings, may have been inadvertently deleted during a complex amendment process. In any event, there was no evidence that Congress was dissatisfied with the 1984 definition, and there was no dispute among the members of Congress on the applicable definition. With the legislative record in mind, this Court has repeatedly excluded vehicles from the definition of burglary, and Congress has not modified the definition based on this Court's interpretation. The government now asks this Court to usurp the role of Congress and redefine burglary to incorporate mobile locations never before included. This Court should decline to do so and affirm the Sixth Circuit Court of Appeals.

STATEMENT OF THE CASE

A. Legal Background

In 1984, Congress enacted the Armed Career Criminal Act, increasing the penalty for a felon in possession of a firearm for defendants with three qualifying predicate offenses. One such qualifying offense is "burglary," which Congress defined as unlawfully entering or remaining in a building with the intent to commit a crime. In 1986,

several amendments to the ACCA were made, and the definition of burglary was deleted.

In 1989, with no statutory definition of burglary remaining, this Court sought to determine what Congress meant by the term. *See Taylor v. United States*, 495 U.S. 575 (1990). After extensive review of the legislative records, *Taylor* held that ACCA burglary "ha[d] the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 592-599. *Taylor* did not define "building or structure" but noted that the definition "is practically identical to the 1984 definition." *Id.* at 598. The Court also noted statutes that extended beyond this definition by including other places, such as vehicles and vending machines. *Id.* at 599. Throughout the years, this Court has held mobile locations do not fall within the definition of buildings and structures. *See Shepard v. United States*, 544 U.S. 13, 15–16 (2005) (burglary does not include boats or motor vehicles); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186–87 (2007) (generic burglary does not include vehicles); *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009) (burglary of a vessel is not a generic burglary); *Mathis v. United States*, __ U.S. __, 136 S. Ct. 2243, 2250 (2016) (Iowa burglary is broader than generic burglary because it includes land, water, and air vehicles.").

B. Factual and Procedural Background

Victor Stitt was convicted by jury of being a felon in possession of a firearm, in violation of 18 U.S.C. § 924(g). At sentencing, the district court found Mr. Stitt to have at least three prior convictions that qualified as violent felonies under the ACCA, 18 U.S.C. § 924(e). Having

been classified as an armed career criminal, Mr. Stitt's statutory penalty for his offense increased from a ten-year maximum to a fifteen-year mandatory minimum term of incarceration. The district court sentenced Mr. Stitt to 290 months in prison, and Mr. Stitt appealed. Cert. Pet. App. at 57a-58a.

On appeal, Mr. Stitt argued, in relevant part, that none of his prior convictions qualified as violent felonies under the ACCA. The government conceded this Court's decision in *Johnson v. United States*, __ U.S. __, 135 S. Ct. 2551 (2015), prohibited certain prior offenses from being qualifying predicates. Therefore, the issue on appeal was limited to whether Tennessee's aggravated burglary statute qualified as "burglary" under the ACCA. Cert. Pet. App. at 62a.

Tennessee aggravated burglary is burglary of a "habitation." Tenn. Code Ann. § 39-14-403. Tennessee defines habitation by listing various means by which a person may satisfy the element of habitation, including structures and vehicles that are designed or adapted for the overnight accommodation of persons and places that are "appurtenant to or connected with" those structures or vehicles. Tenn. Code Ann. § 39-14-401(1). Mr. Stitt's *Shepard* documents did not specify what type(s) of "habitation" were involved in his prior convictions for aggravated burglary. Sixth Cir. No. 14-6158, Stitt Reply, ECF 35, Page 17. On direct appeal, the Sixth Circuit did not consider Tennessee's broad definition of habitation and, relying on its own precedent, held Tennessee's aggravated burglary statute categorically qualified as "burglary" under the ACCA. Cert. Pet. App. at 64a.

Mr. Stitt filed a motion for rehearing en banc, arguing an intra-circuit conflict. The Sixth Circuit had previously held Tennessee's aggravated burglary statute was categorically a violent felony but had "reached the opposite conclusion about Ohio's similarly worded burglary statute." Cert. Pet. App. at 1a-2a. The Sixth Circuit granted Mr. Stitt's motion for rehearing to resolve this conflict.

The government initially conceded Tennessee's aggravated burglary statute covered more places than "buildings or structures." It argued, however, that the aggravated burglary statute was divisible and, therefore, the modified categorical approach applied. While in the en banc briefing stage, this Court issued its decision in *Mathis v. United States*, __ U.S. __, 136 S. Ct. 2243 (2016). The government then changed its position and argued Tennessee's aggravated burglary statute is not divisible but meets this Court's definition of "building or structure" because the vehicles are required to be adapted for overnight accommodations. Cert. Pet. App. at 5a, fn. 1.

The majority of the Sixth Circuit rejected the government's position, finding "the government's arguments . . . ignore the [Supreme] Court's clear and unambiguous language that 'building or other structure' excludes all things mobile or transitory." Cert. Pet. App. at 8a (emphasis in original). "[T]he Supreme Court has held fast to the distinction between vehicles and movable enclosures versus buildings and structures in every single post-*Taylor* decision." Cert. Pet. App. at 6a. "The Court's adherence to this distinction over the course of nearly thirty years persuade[d] [the Sixth Circuit] that the Court meant exactly what it said: vehicles and moveable enclosures fall outside the scope of generic burglary." Cert. Pet. App. at 6a-7a.

The Sixth Circuit reversed the district court and remanded for resentencing without the ACCA classification.

SUMMARY OF THE ARGUMENT

Congress enacted the Armed Career Criminal Act in 1984 and included a definition of burglary that covered only buildings. Congress inadvertently deleted the definition during a complex amendment process. With no definition of burglary remaining in the statute, this Court reviewed the legislative history to divine Congressional intent. This Court concluded Congress did not intend to change the definition of burglary from the one it mistakenly deleted. Nothing in the legislative history suggested Congress was dissatisfied with the 1984 definition, and the record reflected no dispute among members of Congress on the meaning of burglary. Based on Congress' intent, this Court defined burglary to include only buildings and structures. *See Taylor v. United States*, 495 U.S. 575 (1990).

After *Taylor*, Congress sought to recodify the missing definition of burglary multiple times. In every proposed legislation, the definition of burglary included only buildings. In the almost 30 years since *Taylor*, Congress never once proposed extending burglary to include mobile structures of any kind, regardless of whether they are adapted for overnight accommodations.

Taylor considered, but declined to adopt, a definition of burglary identical to the one now proposed by the government. Texas defined burglary of a habitation to include vehicles adapted for overnight accommodation

of persons. Tex. Penal Code § 30.01(1) (1989). The Model Penal Code defined burglary of an occupied structure to include vehicles adapted for overnight accommodation of persons. M.P.C. § 221.0 (1980). Despite these examples, this Court did not define burglary to include habitations, occupied structures, or vehicles adapted for overnight accommodations. Instead, this Court in *Taylor*, consistent with Congress' 1984 definition, defined burglary to include only buildings and structures.

The majority of circuit courts have understood *Taylor*'s definition to exclude vehicles, and the policy of stare decisis weighs heavily in support of maintaining this well-understood definition. Considerations of stare decisis have special force in the area of statutory interpretation. Congress' failure to modify this Court's interpretation in the nearly 30 years since *Taylor* enhances the special force of stare decisis in this case. Moreover, adopting the government's new definition of burglary would only add ambiguity and confusion where there was none. The government offers no definition of what makes a vehicle "adapted for overnight accommodations," and there is no clear consensus among the states on such a definition. The government's proposed definition does not satisfy the Fifth Amendment right to due process.

Even if this Court were to abandon its decades-old definition of burglary and adopt the government's new definition, Tennessee's aggravated burglary statute remains overbroad. Tennessee has defined habitation to include places "appurtenant to" buildings or vehicles. Extending burglary to places that are "appurtenant to" buildings and vehicles makes the statute overbroad.

Alternatively, this Court should overrule *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and hold the ACCA's sentencing enhancement structure violates defendants' Sixth Amendment rights by allowing a judge to make findings of fact that increase the statutory maximum penalty.

ARGUMENT

I. When Congress deleted the definition of burglary this Court was required to divine Congressional intent.

Congress enacted the Armed Career Criminal Act in 1984. The 1984 variant enhanced a sentence for a person convicted of being a felon in possession of a firearm if he or she had three previous convictions "for robbery or burglary, or both." 18 U.S.C. § 1202 (1984). Congress defined burglary as including "any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." 18 U.S.C. § 1202(c)(9) (1984).

In 1986, Congress recodified 18 U.S.C. § 1202 at 18 U.S.C. § 924(e). The statute slightly modified the definition of burglary by clarifying the term "felony." Firearm Owners' Protection Act, Pub. L. No. 99-308, § 104, 100 Stat. 458-59 (May 19, 1986). Burglary was defined in 18 U.S.C. § 924(e) as "any crime punishable by a term of imprisonment exceeding one year and consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." 18 U.S.C. § 924(e)(2)(B) (May 1986).

Five months later, Congress again amended the ACCA with the Career Criminals Amendment Act of 1986. Pub. L. No. 99-570, § 1402, 100 Stat. 3207-39 (Oct. 27, 1986). This amendment replaced the language "for robbery or burglary, or both" with "for a violent felony or a serious drug offense, or both." *Id.* at § 1402(a). Congress included definitions for both "a violent felony" and "a serious drug offense." A violent felony was defined as "any crime punishable by imprisonment for a term exceeding one year that – (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* at § 1402(b)(B).

In that latest amendment, the definition of burglary was deleted, perhaps inadvertently. *See Taylor v. United States*, 495 U.S. 575, 589-90 (1990) ("The legislative history as a whole suggests that the deletion of the 1984 definition of burglary may have been an inadvertent casualty of a complex drafting process."). The ACCA was left, as it is now, without a definition of burglary.

Congress attempted to address this issue when the Senate passed a bill to recodify the deleted definition. S. 1711, 101st Cong. (1989). This definition was identical to the one deleted in the October 1986 amendment. *Id.*; *Taylor*, 495 U.S. at 590, fn. 5. Senator Joseph Biden, introducing the bill, explained that it "corrects an error that occurred inadvertently when the definition of burglary was deleted from the Armed Career Criminal statute in 1986. The amendment reenacts the original definition which was intended to be broader than common law burglary." *Taylor*, 495 U.S. at 590, fn. 5; 135 CONG. REC. S12722-01,

S12749, 1989 WL 185497, 101st Congress, 1st Sess. (Oct. 5, 1989)). The bill passed the Senate in October 1989 and was pending before the House of Representatives when this Court decided *Taylor*. *See id.*

The somewhat convoluted history of the ACCA left this Court, the Judiciary at large, and the fifty states, with some degree of doubt as to the actual definition of "burglary" under the statute. The potential for disparate results from federal courts applying the ACCA based on different state definitions of "burglary" led this Court to grant certiorari in *Taylor*. Without a statutory definition of burglary, this Court sought to divine Congress' intent. *See Taylor*, 495 U.S. 575.

II. *Taylor* concluded that Congress intended a definition of burglary that is "practically identical" to the definition inadvertently deleted in 1986, which categorically excluded vehicles.

Evidence of Congress' intent drove the *Taylor* Court's definition of burglary. The Court considered the ACCA's pre-1986 statutory definition of burglary, Congress' changes to the ACCA statute, and the legislative history related to the 1986 amendment and concluded Congress intended a definition similar to the one mistakenly deleted. Neither state law, the Model Penal Code, nor LaFave's treatise on substantive criminal law dictated the definition adopted by this Court. This Court remained focused on Congress' intent.

A. *Taylor* expressly rejected the notion that a state definition of "burglary" controls the definition of burglary under the ACCA.

Taylor first decided that Congress did not intend burglary to be defined by state law. *Taylor*, 495 U.S. at 588-89. Given that "'burglary' has not been given a single accepted meaning by the state courts" it would seem "implausible" that Congress would intend the definition of burglary in a federal statute to depend on the definition of burglary that happened to be adopted by the state of conviction. *Id.* at 580, 590. "[A]bsent a plain indication to the contrary, federal laws are not to be construed so that their application is dependent on state law." *Taylor*, 495 U.S. 575 at 591 (*citing Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 119-20 (1983)). Thus, burglary under the ACCA "must have some uniform[, generic] definition independent of the labels employed by the various States' criminal codes." *Taylor*, 495 U.S. 575 at 592.

B. *Taylor* cited legislative history to decipher Congressional intent and expressly rejected the notion that burglary should be defined based on the degree of harm posed.

Having decided state law does not drive the federal definition of burglary, the *Taylor* Court turned to legislative history to decipher what Congress meant. Naturally, it began with the definition Congress had previously provided: entering or remaining surreptitiously within a building that is property of another with intent to commit a crime. 18 U.S.C. § 924(e)(2)(B) (May 1986). The Court also examined the legislative records surrounding the deletion of the burglary definition by the Career

Criminals Amendment Act of 1986. Ultimately, this Court concluded, "[n]othing in the legislative history of the 1986 amendment shows that Congress was dissatisfied with the 1984 definition. All testimony and reports read as if the meaning of burglary was undisputed." *Taylor*, 495 U.S. at 589. In fact, the "legislative history as a whole suggests that the deletion of burglary may have been an inadvertent casualty of a complex drafting process." *Id.* at 589-90.

The Court considered the old common law definition of burglary but concluded modern day burglary had little in common with the ancient English law. *Id.* at 592-95. Most states had moved away from the common law definition, which required a breaking and entering of a dwelling at night with the intent to commit a felony. *Id.* at 593. More importantly, "[i]t seems unlikely that the Members of Congress, immersed in the intensely practical concerns of controlling violent crime, would have decided to abandon their modern, generic 1984 definition of burglary and revert to a definition developed in the ancient English law – a definition mentioned nowhere in the legislative history." *Id.* at 593-94.

The government argues *Taylor* must be read to include mobile structures adapted for overnight accommodations of persons because of the greater risk of harm posed by burglarizing a residence. Br. of Pet., p. 26-27. Such a proposal bears a striking resemblance to one suggested by the Petitioner in *Taylor*. Specifically, the Petitioner argued, "Congress meant to include as predicate offenses a subclass of burglaries whose elements include 'conduct that presents a serious risk of physical injury to another,' over and above the risk inherent in ordinary burglaries." *Taylor*, 495 U.S. at 597. *Taylor* expressly rejected that

argument. *Taylor* clearly states that burglary should not be defined to include first-degree or aggravated burglary statutes *because* they posed an increased risk of harm to persons. *See id.* at 596-98. The Court concluded that the statutory language and the legislative history of the ACCA did not support the Petitioner's position. *Id.* at 596-97. "Congress presumably realized that the word 'burglary' is commonly understood to include not only aggravated burglaries, but also run-of-the-mill burglaries involving an unarmed offender, an unoccupied building, and no use or threat of force." *Id.* at 597. *Taylor* therefore did not construct a definition based on the risk of harm. To the extent the government now urges this Court to redefine burglary based on the risk of harm, this Court should again reject that argument for the very same reasons it did so in *Taylor*.

After considering the legislative history, this Court defined generic burglary as "having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 592-599. This definition "is practically identical to the 1984 definition," *id.* at 598, and categorically excludes vehicles.

C. *Taylor* considered, but declined to adopt, a definition identical to the one now proposed by the government.

The government argues that at the time *Taylor* was decided, Texas burglary "covered all vehicles and so [their provisions] were clearly not generic under *Taylor*." Br. for Pet., p. 35, (quoting *Stitt* at 49a (Sutton, J., dissenting)). They go on to suggest that, "*Taylor* had no occasion to

consider whether a more finely tuned burglary statute . . . satisfied its generic definition." Br. for Pet., p. 35. This is incorrect.

The *Taylor* Court reviewed a variety of sources containing statutes that are virtually identical to the new definition the Government now proposes. Therefore, the *Taylor* Court had ample opportunity to include such language, or some derivative thereof, in its generic definition. This Court chose not to do so. This Court should stand by the express language of *Taylor* as understood and applied by federal courts for nearly thirty years.

For example, *Taylor* cited Texas burglary as one example of a state law that was broader than generic burglary because it included vehicles. Texas burglary criminalized unlawfully entering a habitation or a building. *See* Tex. Penal Code § 30.02(a)(1) (1989). "Habitation" was defined as "a structure or vehicle that is adapted for the overnight accommodation of persons, and includes (A) each separately secured or occupied portion of the structure or vehicle; and (B) each structure appurtenant to or connected with the structure or vehicle." Tex. Penal Code § 30.01(1) (1989). Texas had a separate statute criminalizing burglary of vehicles not classified as a habitation. Tex. Penal Code §§ 30.01(3), 30.04 (1989). Texas' definition of habitation only included vehicles adapted for overnight accommodation; it did not include all vehicles. Texas' broad definition of habitation was therefore squarely before this Court for consideration in *Taylor*. *See Taylor*, 495 U.S. at 591 (citing Tex. Penal Code Ann. §§ 30.01-30.05 (1989 and Supp. 1990)). This Court declined to adopt a similar definition.

Taylor also considered, but did not adopt, the Model Penal Code's (M.P.C.) definition. *See Taylor*, 495 U.S. at 598, fn. 8 (burglary definition "approximates" the M.P.C.). The M.P.C. defined burglary as "enter[ing] a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter." M.P.C. § 221.1 (1980). It further defined occupied structure as "any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present." M.P.C. § 221.0 (1980). The government believes *Taylor* must have intended to include vehicles adapted for overnight accommodations because that is how the M.P.C. defined occupied structure. *See* Br. for Pet., pp. 21-22. Yet, the government makes no argument that *Taylor*'s definition of generic burglary includes vehicles used for carrying on business. This Court did not adopt the M.P.C.'s definition of burglary. More to the point, if this Court in *Taylor* had intended to include all places adapted for the overnight accommodations of persons, it could have easily constructed such a definition using the Model Penal Code and Texas statutes as an example.[1] It did not do so.

The Court considered Professor LaFave's treatise on substantive criminal law, but this treatise does not support the government's interpretation of *Taylor*. In defining

1. "The Court could have said 'building or structure or dwelling.' It could have said 'building or structure or *other* dwelling.' It could have said 'building or structure *or other place adapted for overnight accommodation*.' But it didn't. It said 'building or structure." *United States v. Stitt*, 860 F.3d 854, 858, 865 (6th Cir. 2017) (en banc) (Boggs, J., concurring).

burglary to include only "buildings" and "structures," *Taylor* cited to page 471 of LaFave's treatise. The relevant portion of that page stated:

> There is no jurisdiction which retains the common-law requirement that the offense take place against a dwelling house or building within its curtilage for all degrees of the offense, though some require that the offense be against a dwelling house for a higher grade of the offense. Modern statutes instead typically describe the place as a "building" or "structure," and these terms are often broadly construed. Some burglary statutes also extend to still other places, such as all or some types of vehicles.

Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law*, § 8.13(c), page 471 (1986). In a footnote, LaFave provided examples of various state burglary statutes that covered vehicles, including, Texas Penal Code § 30.01, which, as discussed above, defined "habitation" as "a structure or vehicle that is adapted for the overnight accommodation of persons." *See* LaFave, § 8.13(c), page 471-72, fn. 85 (1986). LaFave explained that including some types of vehicles made sense, like Wisconsin's statute that included "[a] motor home or other motorized type of home or a trailer home," W.S.A. 943.10 (1)(e) (1989), but cautioned that many of the states have "broadly interpreted [the statutes] to extend to situations which ought not to be treated as burglary." LaFave, § 8.13(c), page 471-72, fn. 85.

Thus, the *Taylor* Court was well aware of various state statutes that covered vehicles adapted for overnight accommodations and declined to adopt a definition incorporating those locations. The Court cited specifically to page 471 of LaFave's treatise and Texas Penal Code § 30.01 but did not define burglary to include vehicles adapted for overnight accommodations. Instead, the Court adopted a definition to include only buildings and structures: a definition that is "practically identical" to the definition accidentally deleted by Congress in 1986, which covered only buildings. *Taylor*, 495 U.S. at 598. *Taylor* concluded that Congress may have inadvertently deleted the definition during the last amendment to the statute but "[i]n any event, there is nothing in the history to show that Congress intended in 1986 to replace the 1984 'generic' definition of burglary with something entirely different." *Id.* at 590. That definition did not cover nonpermanent or mobile structures, regardless of whether they had been adapted for overnight accommodations or not.

III. Despite numerous bills to add a definition of burglary, Congress has never proposed extending ACCA burglary to places beyond buildings. This Court should not contravene Congressional intent by extending *Taylor*.

Legislative history post-*Taylor* supports this Court's definition to exclude nonpermanent or mobile structures. Senate Bill 1711 was pending in the House of Representatives at the time *Taylor* sought to recodify the previously deleted ACCA definition of burglary. The House did not pass S. 1711 and it never became law. After S. 1711, Congress made several additional attempts to add a definition of burglary back into the ACCA. In each bill,

the definition of burglary remained the same: "entering or remaining surreptitiously within **a building** that is property of another with intent to engage in conduct constituting a Federal or State offense." (emphasis added). Mr. Stitt is unaware of any proposed bill that would have broadened the definition to any place other than a building.

During the 101st Congress, in addition to S. 1711, two senators proposed amendments to Senate Bill 1970 to add the old definition of burglary. 136 CONG. REC. S7154-01, S7162, 1990 WL 291502, 101st Congress, 2nd Sess. (June 5, 1990); 136 CONG. REC. S7197-01, S7215, 1990 WL 74864, 101st Congress, 2nd Sess. (June 5, 1990). No action was taken on either of the proposed amendments.

In the 102nd Congress, at least seven bills or amendments were presented in an attempt to add the ACCA definition of burglary back into the ACCA. In the first session of the 102nd Congress, Senator Biden introduced Senate Bill 618, which contained the same definition of burglary as the one deleted in 1986. 137 CONG. REC. S3021-02, S3058, 1991 WL 32507, 102nd Congress, 1st Sess. (Mar. 12, 1991). This bill did not pass the Senate. In June 1991, Senator Biden introduced Senate Bill 1241. This bill included an identical definition of burglary and passed the Senate in July 1991. In November of 1991, the Senate incorporated S. 1241 into H.R. 3371. The H.R. 3371 passed the Senate with amendments but the differences were never resolved with the House and, therefore, was never enacted into law.

In the second session of the 102nd Congress, Senator Strom Thurmond introduced Senate Bill 2305, which included the same definition of burglary. 138 CONG. REC.

S2674-04, S2697, 1992 WL 39583, 102nd Congress, 2nd Sess. (Mar. 3, 1992). This bill never passed the Senate. In May 1992, Senator Phil Gramm proposed an amendment to Senate Bill 652 to add the definition of burglary. 138 CONG. REC. S6115-02, S6132, 1992 WL 96466, 102nd Congress, 2nd Sess. (May 6, 1992). The Senate never adopted this amendment. In June of 1992, Senator Gramm proposed the same amendment to Senate Bill 55. 138 CONG. REC. S7802-01, S7828, 1992 WL 125816, 102nd Congress, 2nd Sess. (June 10, 1992). Senator Biden proposed a similar amendment to the same Senate Bill 55. 138 CONG. REC. S8002-02, S8013, 1992 WL 127222, 102nd Congress, 2nd Sess. (June 11, 1992). These amendments included a definition of burglary identical to the one deleted by Congress in 1986. The Senate did not adopt either amendment to S. 55. Lastly, in October 1992, Senator Bob Smith proposed an amendment to Senate Bill 2899 to include the missing definition of burglary. 138 CONG. REC. S16360-02, S16376, 1992 WL 274926, 102nd Congress, 2nd Sess. (October 2, 1992). The Senate did not adopt this amendment.

Congress continued to propose this very same definition of burglary in at least five bills or amendments during the 103rd Congress. In January of 1993, Senator Hatch introduced Senate Bill 8, which included the definition of burglary. 139 CONG. REC. S195-02, S304, 1993 WL 11908, 103rd Congress, 1st Sess. (Jan. 21, 1993). This bill never passed the Senate. In August of 1993, Senator Robert Dole introduced Senate Bill 1356, which contained the same definition of burglary. 139 CONG. REC. S10362-02, S10412, 1993 WL 293360, 103rd Congress, 1st Sess. (Aug. 4, 1993). This bill did not pass the Senate. In September 1993, Senator Biden introduced Senate Bill

1488. 139 CONG. REC. S12388-04, S12404, 1993 WL 373577, 103rd Congress, 1st Sess. (Sept. 23, 1993). Senate Bill 1488 did not pass the Senate. In August 1993, H.R. 2872 was introduced and included the definition of burglary under the ACCA. 139 Cong. Rec. H10191-02, H10241, 1993 WL 489922, 103rd Congress, 1st Sess. (Nov. 19, 1993). This bill did not pass the House. In November 1993, the Senate passed an amendment to H.R. 3355 to include the definition of burglary under the ACCA. 139 CONG. REC. S17095-03, S17108, 1993 WL 493791, 103rd Congress, 1st Sess. (Nov. 24, 1993). This bill eventually became Public Law No. 103-322 but did not retain the definition of burglary.

In all, over a period of four years Congress sought fifteen times to add the definition of burglary back into the ACCA. Every one of those proposed definitions included the identical definition of burglary that was deleted by Congress in 1984. Not once, during those four years or at any time since, did Congress propose a definition of burglary that would have extended to places other than buildings.

IV. This Court has consistently held that ACCA burglary does not include vehicles, and it should continue to maintain the ACCA's well-understood definition.

Throughout the years since *Taylor*, this Court has maintained the exclusion of vehicles from the definition of generic burglary. *Shepard v. United States*, 544 U.S. 13, 15–16 (2005) ("The [ACCA] makes burglary a violent felony only if committed in a building or enclosed space ('generic burglary'), not in a boat or motor vehicle.");

Gonzales v. Duenas-Alvarez, 549 U.S. 183, 186–87 (2007) (noting that Massachusetts defines burglary to include breaking into a vehicle, "which falls outside the generic definition of 'burglary,' for a car is not a 'building or structure'" (citations omitted)); *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009) (noting that "breaking into a building" would qualify as generic burglary, but breaking into a "vessel" would not).

Even the government understood this Court's definition of burglary to exclude vehicles. *See e.g., United States v. Narvarro*, 584 F. App'x 624, 625 (9th Cir. 2014) ("The government concedes that a conviction for violating [Ariz. Rev. Stat. Ann. § 13-1501] does not qualify as generic burglary under the categorical approach because . . . generic burglary does not include burglary of movable structures and, under section 13-1501, the structure can be either moveable or immovable . . . ."). In *Mathis v. United States*, __ U.S. __, 136 S. Ct. 2243, 2250 (2016), the government conceded "that the Iowa burglary statute is broader than generic burglary, because generic burglary involves unlawful entry into a 'building' or 'structure,' *Taylor*, 495 U.S. at 599, and the Iowa statute prohibits unlawfully entering additional places, such as 'vehicle[s].'" Govt Merits Brief, 2016 WL 1165970, *5 (quoting Govt Sent. Mem. 3-4 (citing Iowa Code § 713.1 (1989) (defining burglary as unlawful entry into an "occupied structure") and Iowa Code § 702.12 (1989) (defining "occupied structure" through an enumerated list of places that includes buildings, structures, and vehicles.))).

Iowa Code § 702.12 (1989) defined "occupied structure" as "any building, structure, appurtenances to buildings and structures, land, water or air vehicles, **or similar**

place adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein . . . ." (emphasis added). The government never took the position that a vehicle adapted for overnight accommodation of persons fell within the *Taylor* definition of burglary. On the contrary, the government conceded that including vehicles made Iowa's statute broader than generic burglary. *Mathis*, 136 S. Ct. at 2250; Govt Merits Brief, 2016 WL 1165970, *5, *44-45.

This Court in *Mathis* agreed that Iowa's burglary statute was not generic. *Mathis*, 136 S. Ct. at 2250. "The Court paid no attention to the limiting characteristics imposed by the Iowa statute – the requirement that any vehicle be 'adapted for overnight accommodation of persons. . . .' Instead, the Court flatly said that the Iowa statute is overbroad because it reaches 'land, water, or air vehicle[s],' full stop." *United States v. Herrold*, 883 F.3d 517, 538 (5th Cir. 2018) (en banc), *petition for cert. filed* Apr. 19, 2018 (No. 17-1445), *cross petition for cert. filed* May 29, 2018 (No. 17-9127).

In this case, the government never argued that generic burglary included nonpermanent or mobile enclosures adapted for overnight accommodations until *Mathis* was decided. *See* Supp. Reply Brief, *United States v. Stitt*, No. 14-6158 (6th Cir. Sept. 9, 2016), ECF 56, p. 5 ("In its supplemental brief the government argues, for the first time, that Tennessee's aggravated burglary statute is generic because the element of habitation "fits within the locational element of generic burglary described in *Taylor*."). It is the government's change in position that has caused confusion.

The circuit courts overwhelmingly agree that *Taylor* and its progeny exclude vehicles from the definition of generic burglary. *United States v. Lamb*, 847 F. 3d 928, 931 (8th Cir. 2017), *cert. denied* Apr. 2, 2018, (Wisconsin burglary statute "encompasses a broader range of conduct than generic burglary as defined in *Taylor*, such as burglary of railroad cars, ships, trucks, and motor homes."); *United States v. Gundy*, 842 F.3d 1156, 1169 (11th Cir. 2016), *cert. denied*, 138 S. Ct. 66 (2017), (holding Georgia's burglary statute is divisible and Gundy's convictions were "either dwelling houses or buildings housing a business, which are generic burglaries. Importantly, none [of the burglaries] were [of] vehicles, railroad cars, watercrafts, or aircrafts, which are not generic burglaries."); *United States v. Henriquez*, 757 F.3d 144, 146 (4th Cir. 2014) (holding Maryland's burglary statute is nongeneric because it "covers burglaries of motor vehicles or boats – places the United States Supreme Court has expressly excluded from generic burglary."); *United States v. Howard*, 742 F.3d 1334, 1348 (11th Cir. 2014) (holding Alabama's burglary statute is not generic because "[a] number of [ ] things included in the definition of 'building' (such as vehicles and watercraft) fall outside the 'building or structure' element of generic burglary."); *United States v. Grisel*, 488 F.3d 844, 851, fn.5 (9th Cir. 2007) (en banc), *cert. denied*, 552 U.S. 970 (2007), ("To the extent that our precedents suggest that state statutes satisfy the categorical inquiry when they define burglary to include non-buildings adapted for overnight accommodation, they are overruled."); *United States v. Bennett*, 100 F.3d 1105, 1109 (3rd Cir. 1996) (holding Pennsylvania's burglary statute is broader than generic because it "includes within its definition of occupied structure any vehicle adapted for overnight accommodations or for business.").

The few decisions that erroneously include vehicles adapted for overnight accommodation in the generic definition rely on a Tenth Circuit case decided before *Shepard*, *Nijhawan*, *Duenas-Alvarez*, *Descamps*, and *Mathis*. In 1996, the Tenth Circuit, in *Spring*, held Texas' burglary of a habitation statute qualified as generic burglary. *United States v. Spring*, 80 F.3d 1450, 1461-62 (10th Cir. 1996), *cert. denied*, 519 U.S. 963 (1996). It reasoned that because the statute only covered vehicles adapted for the overnight accommodation of persons, it fell within this Court's definition of generic burglary as defined in *Taylor*. In reaching its conclusion, the Tenth Circuit relied entirely on two cases: *United States v. Silva*, 957 F.2d 157 (5th Cir. 1992), *cert. denied*, 506 U.S. 887 (1992), and *United States v. Sweeten*, 933 F.2d 765 (9th Cir. 1991). *Sweeten* and *Silva* are no longer good law. *Sweeten* was overruled by *Grisel*, 488 F.3d 844, and *Silva* was overruled by *Herrold*, 883 F.3d 517. *Spring* is now an outlier without support.[2]

The Seventh Circuit recently held that mobile homes and trailers in which "owners or occupants actually reside or . . . intend within a reasonable period of time to reside" are "structures" within this Court's definition. *Smith v. United States*, 877 F.3d 720 (7th Cir. 2017) (*citing* 720 ILCS 5/2-6), *petitions for cert. filed* Jan. 23, 2018 (No. 17-7517) and March 20, 2018 (No. 17-8160). To reach its conclusion, the panel in *Smith* relied entirely on *Spring*,

2. The Tenth Circuit has called the validity of *Spring* into question. *See United States v. Robinson*, 720 F. App'x 946, 953-55 (10th Cir. 2018), *petition for cert. filed* Apr. 9, 2018 (No. 17-8457), (Holmes, J., concurring) (*Spring* has been abrogated by *Shepard* and has "not [been] cited in either precedential or persuasive authority in defining the scope of generic burglary" since.).

80 F.3d 1450, and Judge Sutton's dissent in this case. As discussed above, *Spring* is no longer good law. The *Smith* court rationalized its decision by remarking, "it is unlikely that the Justices set out in *Taylor* to adopt a definition of generic burglary that is satisfied by no more than a handful of states – if by any." *Smith*, 877 F.3d at 724. This rationalization relies on the faulty premise that if the Court constructs a definition of generic burglary to include nonpermanent or mobile structures that are adapted for overnight accommodations, the majority of states' burglary statutes would be included. This is incorrect.

V. State criminal codes at the time of *Taylor* do not support the government's position. A closer analysis of state burglary statutes undermines the government's argument.

The government argues that *Taylor*'s definition of generic burglary must have meant to include nonpermanent or mobile structures that are adapted or used for overnight accommodation because the majority of states "had at least one burglary statute that protected nonpermanent or mobile structures." Br. for Pet., p. 18. The government's argument is flawed. "If its approach were correct, it would make no sense to draw the line at vehicles-*cum*-dwellings – the tallying would require some larger subcategory of vehicles to count as viable locations for generic burglary." *Herrold*, 883 F.3d at 541.

At the time *Taylor* was decided, the government cites 19 states as having burglary statutes that covered nonpermanent or mobile structures "irrespective of their purpose." Br. for Pet., App. B, pp. 21a-38a. As an example, Idaho's burglary statute provided, "Every

person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, closed vehicle, closed trailer, airplane or railroad car, with the intent to commit any theft or any felony, is guilty of burglary." I.C. § 18-1401 (1989). Idaho burglary does not limit burglary to vehicles adapted for overnight accommodations.[3] Idaho, and similar states that provide no limitation to the vehicles included in their burglary statutes, have statutes that sweep broader than generic burglary, even if this Court were to adopt the government's new definition. Thus, those states offer no support for the government's argument that *Taylor* must have meant to include vehicles adapted for overnight accommodation in its definition of generic burglary.

Similarly, the other 25 states the government cites as having burglary statutes "encompassing nonpermanent or mobile structures used for enumerated purposes" are not limited to those adapted for overnight accommodation of persons. Br. for Pet., App. B, pp. 21a-38a. Many include vehicles or moveable enclosures that have some other purpose like carrying on a business,[4] business

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3. In 1997, Idaho changed the portion of its burglary statute from "closed vehicle, closed trailer" to just "vehicle, trailer." "The amendment [ ] clarify[ies] the Legislature's intent to allow prosecution for burglary of a vehicle or trailer without the additional evidentiary requirement of proof of the vehicle or trailer's temporary, alterable condition at the time of entry, such as whether the window was up or down at the time of reaching into the vehicle." CRIMES AND PUNISHMENTS—BURGLARY—VEHICLE OR TRAILER, 1997 Idaho Law Ch. 87 (H.B. 97).

4. Alabama, Alaska, Arkansas, Colorado, Iowa, Missouri, Montana, New Hampshire, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Utah, Washington

transportation,[5] where people assemble for the purposes of business,[6] or are used to store, transport, or sell goods or merchandise.[7] For example, the Eighth Circuit sitting en banc held Missouri's second-degree burglary statute is broader than generic burglary because the statute was indivisible and the definition of inhabitable structure was overbroad. *United States v. Naylor*, 887 F.3d 397, 400, 406-07 (8th Cir. 2018) (en banc). Missouri defined inhabitable structure as:

> a ship, trailer, sleeping car, airplane, or other vehicle or structure:
>
> (a) Where any person lives or carries on business or other calling; or
>
> (b) Where people assemble for purposes of business, government, education, religion, entertainment or public transportation; or
>
> (c) Which is used for overnight accommodation of persons. Any such vehicle or structure is "inhabitable" regardless of whether a person is actually present . . .

Naylor, 887 F.3d at 401 (citing Mo. Rev. Stat. § 569.010(2) (1979)).[8]

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5. Arizona

6. Arkansas, Kentucky, Iowa, Missouri, South Carolina

7. Iowa, Mississippi, South Carolina, Washington

8. The current definition of "inhabitable structure" is substantially similar. *See Naylor*, 887 F.3d at 401, fn 3 (citing Mo. Rev. Stat. § 556.061(30) (2017)).

In reality, very few statutes would be included in the government's expanded definition of generic burglary. *See Herrold*, 883 F.3d at 541, fn, 139 ("By our count, well over thirty states included some kind of vehicles outside just mobile dwellings and habitations in their burglary statutes. Far fewer states – only around seven – drew the line to include only those vehicles that could plausibly be called dwellings or mobile habitations.").[9] Using the categorical approach, the overwhelming majority of state burglary statutes will sweep more broadly than generic burglary even if this Court adopts the government's new definition. Many state statutes are structured similar to Missouri with an overbroad definitional section.

Another example is Iowa's overly broad statute, which this Court recently addressed in *Mathis*. 136 S. Ct. 2243. Iowa prohibits the unlawful entry into an "occupied structure." *See* I.C.A. §§ 713.1 – 713.6. Occupied structure is defined as "any building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place adapted for overnight accommodation of

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9. Even the government cannot agree on how many states will be affected. *Compare* Br. for Pet., p. 18 (suggesting 44 jurisdictions protect nonpermanent or mobile structures), *with* Pet. Reply to BIO, p. 7, fn. 3 (arguing 20 states have applicable statutes). Mr. Stitt disagrees with both of the government's proposed numbers. For example, the government includes South Carolina in the list of 20 states that will be directly affected if this Court adopts its proposed definition. However, South Carolina's definition of dwelling includes "erections which are within 200 yards of [a dwelling house] and are appurtenant to it." S.C. Code § 16-11-10 (2018). This likely makes South Carolina's burglary of a dwelling overbroad regardless of whether this Court adopts the government's new definition.

person, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value." I.C.A. § 702.12. The listed locations in the occupied structure definitional statute "are not alternative elements, going to the creation of separate crimes. To the contrary, they lay out alternative ways of satisfying a single locational element." *Mathis*, 136 S. Ct. at 2250. Thus, the type of "occupied structure" is a factual finding that cannot be considered by the sentencing court for ACCA enhancement purposes. Because "occupied structure" includes more than just "buildings or structures" or moveable structures that are adapted for overnight accommodations, Iowa's burglary statute is broader than generic burglary even using the government's new definition.

A closer analysis of state burglary statutes undermines the government's argument that *Taylor* must have meant to include vehicles that have been adapted for overnight accommodations in its definition. A majority of states' burglary statutes do not limit the inclusion of vehicles and moveable structures to only those locations adapted for the overnight accommodations of persons. *See Herrold*, 883 F.3d at 541, fn, 139.

VI. This Court should not expand the definition of generic burglary to compensate for the unconstitutionally vague residual clause.

Congress drafted the ACCA in an unconstitutional way. *See Johnson v. United States*, 135 S. Ct. 2551 (2015) (striking the ACCA residual clause as unconstitutionally vague). This Court should decline to expand the definition of generic burglary beyond what Congress intended it to be in an effort to compensate for the voided residual clause.

Some state burglary statutes only qualified as violent felonies under the ACCA's residual clause. *See, e.g., United States v. Moncrief*, 356 F. App'x 11 (9th Cir. 2009) (finding Tennessee's aggravated burglary statute nongeneric but a violent felony under the ACCA's residual clause). Without the residual clause, fewer burglary statutes will qualify as violent felonies under the ACCA. This is a problem for Congress to fix.

Throughout the years, this Court has raised concerns about the narrowing of the ACCA and has "suggested to Congress that it reconsider how the ACCA is written." *Mathis*, 136 S. Ct. at 2257 (citing *Chambers v. United States*, 555 U.S. 122, 133 (2009) (Alito, J., concurring in judgment); *see Descamps v. United States*, 570 U.S. 254, 278-89 (2013) (Kennedy, J., concurring)). Notably, Congress is aware of decisions narrowing the application of the ACCA. In 2010, Senator Arlen Spector recognized "a series of Supreme Court rulings" have "restricted when and how the Act is applied" and introduced Senate Bill 4045 "to clarify and strengthen the armed career criminal provisions." 156 CONG. REC. S10514-04, S10516-17, 2010 WL 5135528, 111th Cong., 2nd Sess. (Dec. 17, 2010).

The solution to the ACCA, Senator Spector concluded, "is simple." 156 CONG. REC. S10514-04, S10517, 2010 WL 5135528, 111th Cong., 2nd Sess. (Dec. 17, 2010). Senate Bill 4045 proposed "lowering the maximum sentence under the section 924(e) from life to 25 years, and increasing the maximum sentence under section 922(g) from 10 years to 25 years." 156 CONG. REC. S10514-04, S10517, 2010 WL 5135528, 111th Cong., 2nd Sess. (Dec. 17, 2010). This would avoid any implication of *Apprendi v. New Jersey*, 530 U.S. at 466 (2000), and give the federal sentencing courts full

discretion at sentencing. Senate Bill 4045 never passed the Senate.[10]

This Court should not "introduce inconsistency and arbitrariness" by redefining burglary from what federal courts have understood it to mean for nearly 30 years. *See Mathis*, 136 S. Ct. at 2257. This Court has repeatedly held vehicles are not "buildings" or "structures" within the generic meaning and has never distinguished vehicles that were adapted for overnight accommodation. *See Mathis*, 136 S. Ct. 2243; *United States v. Stitt*, 860 F.3d 854, 858 (6th Cir. 2017) (en banc). "Coherence has a claim on the law." *Mathis*, 136 S. Ct. at 2257.

VII. The policy of stare decisis weighs heavily in support of maintaining *Taylor*'s well-understood definition.

The doctrine of stare decisis is an important staple in American jurisprudence. It "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 287 (1991). Arguments in support of stare decisis are particularly strong when this Court has interpreted a criminal statute. *Shepard*, 544 U.S. at 23 (2005) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989)) ("Considerations of stare decisis have special force in the area of statutory

10. On August 1, 2018, Senators Orrin Hatch and Tom Cotton introduced The Restoring the Armed Career Criminal Act of 2018. Additionally, in August 2018, United States Attorney General Jeff Sessions made a public call to Congress to amend the ACCA.

interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.").

Consistency in statutory interpretation is necessary to eliminate ambiguity, arbitrary enforcement, and to provide defendants the kind of notice that is required by the due process clause of the Fifth Amendment. Nearly every federal court has understood this Court's interpretation of generic burglary to exclude vehicles. This precedential force is enhanced with "nearly [30] years having passed since *Taylor* came down, without any action by Congress to modify the statute as subject to [this Court's] understanding . . . ." *Shepard*, 544 U.S. at 23. While Congress sought multiple times to add the missing definition of burglary back into the ACCA, every proposed definition covered only buildings. In the 34 years since the enactment of the ACCA, Congress has never once proposed extending the burglary definition to vehicles adapted for overnight accommodations of persons.

The government has also historically understood *Taylor* to exclude vehicles. Prior to *Mathis*, the government conceded vehicles were not included in this Court's definition of generic burglary. The government appears to have changed course only after this Court limited the scope of the ACCA in *Johnson* (2015) and *Mathis*. The government's new position undercuts its argument that *Taylor* must have meant to include mobile structures all along. Moreover, the government's new definition only adds confusion where there was previously none.

Adopting the government's definition would create confusion and ambiguity. The government has offered no definition of "adapted for overnight accommodations." It

is unclear what law would drive this definition. Mr. Stitt has been unable to find any consensus on such a definition. *Compare United States v. Sparks*, 265 F.3d 825, 834 (9th Cir. 2001), *overruled by Grisel*, 488 F.3d 844 (only vehicles that have "either undergone a fundamental alteration, or [was] originally [ ] designed as a home" qualify), *with California v. Fleetwood*, 171 Cal. App. 3d 982, 987 (Ct. App. 1985) (requiring only that "a person with possessory rights use[] the place as sleeping quarters intending to continue doing so in the future."). "[W]hat makes [a vehicle] suitable or not suitable for overnight accommodation is a subjective factual question for the jury's determination." *Price v. Texas*, No. 08-01-00073-CR, 2002 WL 471343, at *3 (Tex. App. Mar. 28, 2002).

With no clear definition of adapted for overnight accommodation, the government's proposed definition is ambiguous and raises due process concerns. The Fifth Amendment to the United States Constitution guarantees a criminal defendant due process of law before he is deprived of life, liberty, or property. U.S. CONST. amend. V. The government "violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson*, 135 S. Ct. at 2556. This Court should not add more arbitrariness into the ACCA by adopting the government's definition.

For almost 30 years, this Court has defined generic burglary under the ACCA to exclude vehicles. Congress has made no attempt to broaden this definition. The doctrine of stare decisis is particularly strong in this case and this Court should decline to abandon its decades-old

interpretation of the statute because doing so will only create confusion and ambiguity.

VIII. Even if the Court applies the government's novel interpretation of "building or structure" to include vehicles modified for overnight accommodations, Tennessee's burglary statute is still overbroad and, therefore, cannot fit within the definition of "generic burglary."

Tennessee's definition of habitation is still overbroad even if this Court were to adopt the government's new definition of generic burglary. Tennessee aggravated burglary is burglary of a "habitation." Tenn. Code Ann. § 39-14-403. Tenn. Code Ann. § 39-14-401(1) defines habitation by listing various means by which a person may satisfy the element of habitation. *See Stitt*, 860 F.3d at 862 (the parties, and the majority of the Sixth Circuit, agree that the definition of habitation "lays out alternative means to fulfilling a single element rather than alternative elements). Because Tenn. Code Ann. § 39-14-401(1) lists means and not elements, the modified categorical approach does not apply. *See Descamps*, 570 U.S. at 258.

Applying the categorical approach, Tennessee's "habitation" is broader than building, structure, or nonpermanent or mobile structure adapted for overnight accommodation of persons. Habitation:

> (A) Means any structure, including buildings, module units, mobile homes, trailers, and tents, which is designed or adapted for the overnight accommodation of persons;

> (B) Includes a self-propelled vehicle that is designed or adapted for the overnight accommodation of persons and is actually occupied at the time of initial entry by the defendant; **and**
>
> (C) Includes each separately secured or occupied portion of the structure or vehicle and each structure appurtenant to or connected with the structure or vehicle[.]

Tenn. Code Ann. § 39-14-401(1) (emphasis added). Subsection (C) includes places that are appurtenant to or connected with a structure or vehicle. "[A]ppurtenant to' can mean that an object is physically attached to another object, but it can also imply a relationship between two objects." *United States v. Lara*, 590 F.App'x 574, 579 (6th Cir. 2014). "An appurtenance is defined as "[s]omething that belongs or is attached to something else." *State v. Thompson*, No. M201400596CCAR3CD, 2015 WL 1756448, at *6 (Tenn. Crim. App. Apr. 15, 2015) (quoting Black's Law Dictionary (9th ed.2009)).

In *Thompson*, the Tennessee court held that an RV attached to the defendant's home by an electrical cord was "appurtenant to" the defendant's residence despite being parked on the neighbor's property. *Id.* Following the logic from *Thompson*, an electric vehicle that is plugged into any building's electrical outlet would be "appurtenant to" that building and meet the habitation definition under Tenn. Code Ann. § 39-14-401(1)(C) regardless of whether the vehicle was designed or adapted for overnight accommodations.

Tennessee's broad definition of the element of habitation makes Tennessee's aggravated burglary statute overbroad even if this Court were to break from its own precedent and adopt the government's new definition of generic burglary.

IX. Alternatively, this Court should hold the ACCA's sentencing structure violates Mr. Stitt's Sixth Amendment rights.

A defendant's Sixth Amendment rights are violated when a judge makes a finding of fact that increases the penalty for a crime beyond the prescribed statutory maximum. *See Apprendi*, 530 U.S. at 489. Long ago, this Court carved out an exception for proof of prior convictions. *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Although this Court has raised concerns that *Almendarez-Torres* was incorrectly decided and should be revisited, it has not yet done so. *See Apprendi*, 530 U.S. at 489; *see Shepard*, 544 U.S. at 27 (Thomas, J. concurring) ("a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided.").

Justice Thomas has suggested that "this Court should consider *Almendarez-Torres*' continued viability" in the appropriate case because "[i]nnumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of *Almendarez-Torres*." *Shepard*, 544 U.S. at 28. Stitt presents such an appropriate case. The current sentencing structure of the ACCA is irreconcilable with Mr. Stitt's Sixth Amendment rights. This Court should take the opportunity to overrule *Almendarez-Torres* and hold the sentencing structure of the ACCA is unconstitutional.

CONCLUSION

For the foregoing reasons, the Sixth Circuit Court of Appeal en banc opinion should be affirmed.

Respectfully submitted,

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